STATE OF MICHIGAN

COURT OF APPEALS

JODIE RAE BATES-RUTLEDGE,

Plaintiff-Appellant,

v

ROY LAMONT RUTLEDGE, III,

Defendant-Appellee.

UNPUBLISHED
April 6, 2006

No. 265263
Lapeer Circuit Court
LC No. 03-032466-DM

Before: Schuette, P.J., and Murray and Donofrio, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order awarding joint legal and physical custody of the parties' three boys, with the children living primarily with defendant during the school year. Because the trial court did not err in conducting a best interests hearing, and because the physical placement of the children with defendant was within the trial court's discretion, we affirm.

The parties' judgment of divorce provided that both parties were to have joint legal custody of the children and defendant was to have sole physical custody of the children. Plaintiff appealed that final judgment, and this Court reversed and remanded. *Bates-Rutledge v Rutledge*, unpublished opinion per curiam of the Court of Appeals, issued January 11, 2005 (Docket No. 257186). On remand, the trial court awarded joint legal and physical custody of the children, with the children living primarily with defendant during the school year. In order to offset the disparity of parenting time during the school year, the court further ordered that plaintiff was to have seven weeks of parenting time during the summer and defendant was to have three weeks of parenting time.

Plaintiff first contends the trial court erroneously conducted an evidentiary hearing on all of the best interest factors set forth in MCL 722.23, rather than limiting the issues on remand to factors (a) and (b). "Whether law of the case applies is a question of law subject to review de novo." *Ashker v Ford Motor Co*, 245 Mich App 9, 13; 627 NW2d 1 (2001). "A ruling by this Court binds the trial court on remand, pursuant to the law of the case doctrine." *Sumner v General Motors Corp* (*On Remand*), 245 Mich App 653, 661; 633 NW2d 1 (2001). Therefore, "a trial court may not take any action on remand that is inconsistent with the judgment of the appellate court." *Kalamazoo v Dep't of Corrections* (*After Remand*), 229 Mich App 132, 135; 580 NW2d 475 (1998). Likewise, "legal questions thus determined by the appellate court will not be differently determined on a subsequent appeal in the same case where the facts remain materially the same." *Id.* at 135, quoting *CAF Investment Co v Saginaw Twp*, 410 Mich 428,

454; 302 NW2d 164 (1981). However, the law of the case does not control if there has been a material change in facts. *South Macomb Disposal Auth v American Ins Co*, 243 Mich App 647, 654; 625 NW2d 40 (2000).

When determining child custody, a court must review the facts of each case relative to the best interest factors found at MCL 722.23. Inherently, child custody decisions are fact specific. When an appellate court remands a custody case for additional inquiry, "the court should consider up-to-date information, including the children's current and reasonable preferences, as well as the fact that the children have been living with [a party] during the appeal and any other changes in circumstances arising since the trial court's original custody order." *Fletcher v Fletcher*, 447 Mich 871, 889; 526 NW2d 889 (1994). Although an appellate court may find that a trial court's findings on only one or two of the best interest factors were against the great weight of the evidence, due to the fact specific inquiry of child custody cases, material facts often change between the time of the initial custody hearing and the custody hearing on remand. As the material facts change, the factual basis upon which an appellate court based its decision with regard to the best interest factors may no longer be applicable. Therefore, trial courts often review updated factual information relative to all the best interest factors on remand. See *Ireland v Smith*, 451 Mich 457, 468-469; 547 NW2d 686 (1996).

Numerous material facts relative to the best interest factors changed between the time of the trial court's original evidentiary hearing and its evidentiary hearing on remand. Accordingly, we conclude that the trial court did not err in conducting an evidentiary hearing relative to all of the best interest factors.

Plaintiff next contends the court erred in granting joint legal and physical custody of the three minor children and ordering that the children live primarily with defendant during the school year. As this Court stated in its last review of this case:

> In custody cases, we apply three standards of review. *Thompson v Thompson*, 261 Mich App 353, 358; 683 NW2d 250 (2004). The great weight of the evidence standard applies to all findings of fact. *Id.* We should affirm a trial court's findings regarding the existence of an established custodial environment and regarding each custody factor unless the evidence clearly preponderates in the opposite direction. *Id.* We review a trial court's discretionary rulings, such as custody decisions, for an abuse of discretion. *Id.* We review questions of law for clear legal error. *Id.* A trial court commits clear legal error when it incorrectly chooses, interprets, or applies the law. *Id.* "To expedite the resolution of a child custody dispute by prompt and final adjudication, all orders and judgments of the circuit court shall be affirmed on appeal unless the trial judge made findings of fact against the great weight of evidence or committed a palpable abuse of discretion or a clear legal error on a major issue." MCL 722.28. [*Bates-Rutledge, supra*.]

"In any custody dispute, our overriding concern and the overwhelmingly predominant factor is the welfare of the child . . . [T]he best interest of the child shall control." *Heid v Aasulewski* (*After Remand*), 209 Mich App 587, 595; 532 NW2d 205 (1995) (citations omitted.). However, before a trial court determines the child's best interests, it must determine

whether an established custodial environment exists. *Mogle v Scriver*, 241 Mich App 192, 197; 614 NW2d 696 (2000). "The custodial environment of a child is established if over an appreciable time the child naturally looks to the custodian in that environment for guidance, discipline, the necessities of life, and parental comfort. The age of the child, the physical environment, and the inclination of the custodian and the child as to permanency of the relationship shall also be considered." MCL 722.27(1)(c).

There is no dispute that an established custodial environment existed with plaintiff until August 2004 when the children began living primarily with defendant. As revealed at trial, both parents love their children and are interested in their children's education and extra-curricular activities. Each parent has a suitable home and is able to provide medical care and other basic necessities. The court met with the two older children and concluded that they loved both of their parents and wanted to live with both of them. Therefore, it appears the children looked to both parents for guidance, discipline, the necessities of life, and parental comfort. See MCL 722.27(1)(c). Accordingly, we conclude that the trial court did not err in concluding that an established custodial environment existed with both parents.

The court must next review the best interest factors as set forth in MCL 722.23:

> (a) The love, affection, and other emotional ties existing between the parties involved and the child.
>
> (b) The capacity and disposition of the parties involved to give the child love, affection, and guidance and to continue the education and raising of the child in his or her religion or creed, if any.
>
> (c) The capacity and disposition of the parties involved to provide the child with food, clothing, medical care or other remedial care recognized and permitted under the laws of this state in place of medical care, and other material needs.
>
> (d) The length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity.
>
> (e) The permanence, as a family unit, of the existing or proposed custodial home or homes.
>
> (f) The moral fitness of the parties involved.
>
> (g) The mental and physical health of the parties involved.
>
> (h) The home, school, and community record of the child.
>
> (i) The reasonable preference of the child, if the court considers the child to be of sufficient age to express preference.
>
> (j) The willingness and ability of each of the parties to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent or the child and the parents.

(k) Domestic violence, regardless of whether the violence was directed against or witnessed by the child.

(l) Any other factor considered by the court to be relevant to a particular child custody dispute.

Plaintiff does not dispute the trial court's rulings on factors (a), (c), (h), (i), or (k), so the focus of this appeal is on the remaining factors. With regard to factor (b), the court found that plaintiff was unable to control her emotions in front of the children and that defendant showed a stronger commitment to taking the children to church on a regular basis. Therefore, the court concluded that defendant prevailed on this factor.

Plaintiff contends the court improperly considered the domestic violence perpetrated on defendant by plaintiff in this factor because it was more appropriately considered in factor (f). However, this Court has noted that the factors have some natural overlap, and therefore, a particular fact can be considered under more than one factor. See *Fletcher v Fletcher*, 229 Mich App 19, 24-25; 581 NW2d 11 (1998); *Carson v Carson*, 156 Mich App 291, 299-300; 401 NW2d 632 (1986).

In this case, defendant testified that plaintiff would make snide comments and badmouth defendant in front of the children during exchanges. Additionally, there was an incident at defendant's home that resulted in plaintiff's arrest for domestic assault. Dr. Wermuth of the Lapeer County Family Independence Agency at Children's Protective Services made the following conclusions regarding the parties' relationship:

> The concern I have is that the mom experiences high anxiety whenever the children are not with her. This anxiety transfers to the children. Mother and father do not communicate. Each parent makes negative comments about the other that the other denies. Or, the other parent will have and [sic] explanation. Primarily it is [plaintiff] whose anxiety feeds chaos. Stepmom and father provide more stability and the therapy sessions with [the children] have gone well. I have discussed this very frankly with [plaintiff] and have encouraged her to address her feelings of anxiety and her feelings about [defendant]. [Plaintiff] states that stepmom . . . is reasonable with her and she and [stepmom] seem to be able to communicate better. I believe that [plaintiff's] positive feeling toward [stepmom] is a strength and a good foundation for building a civil relationship with [defendant].

At trial, Dr. Wermuth testified that he felt plaintiff was "bringing the fight, pressing the battle."

Although the trial court noted it was plaintiff's love for her children that drove her to this emotional breaking point, the fact remained that plaintiff has difficulty controlling her emotions and allows her emotions to control her reason and logic. Plaintiff's emotional instability has the potential to affect the guidance and emotional stability she can provide for her children.

Although it appears attendance at an organized religious event was not an integral component of the parties' marriage, defendant's church attendance appears to be more consistent, and therefore defendant is more likely to continue to raise the children in their religious creed. Accordingly, we conclude that the trial court's findings with regard to factor (b) were not against the great weight of the evidence.

With regard to factor (d), the trial court initially, and on remand, found that both parties had "established stable and satisfactory environments." Since August 2004, the children have been living primarily with defendant, his wife, Anna, their child, and defendant's stepson. Plaintiff is able to provide the boys with a suitable home in which each of the boys has his own bedroom, the house is close to her parent's house, and there is a lot of land for the boys to play on. Defendant is also able to provide a suitable home for the boys. Defendant testified that he and Anna have a good relationship, and Jodi Kern, Dr. Wermuth's colleague, noted that there does not appear to be any fighting in defendant's home except when the separated couples have contact. It also appears that the boys have developed a relationship with Anna, their new stepbrother, and their half-brother. Anna testified that she is a stay at home mom and does various activities and crafts with the children during the day. Kern also concluded that any physical discipline used in defendant's home was appropriate.

Therefore, it appears both parents are able to provide satisfactory homes for the children. Accordingly, we find that the court's findings with regard to factor (d) were not against the great weight of the evidence.

With regard to factor (e), on remand, the trial court stated:

> As a family unit the children have been living with the Defendant for about nine months. The Defendant has a new wife and child. The new wife, Anna, appears to be a stabilizing influence on all concerned and at times acts as an intermediary between the parties. The children have also formed a bond with the new child of Defendant.
>
> The Plaintiff is living alone although very near her parents. The Defendant prevails on this factor having established a consistent and solid traditional family unit. However, because the Plaintiff is not currently employed she actually has more time to spend with the children.

Plaintiff contends the court erred in focusing on Anna's influence on the family and is now penalizing plaintiff for not having gotten married shortly after the parties' divorce. "[T]he focus of factor e is the child's prospects for a stable family environment." *Ireland, supra* at 465. Such prospects might include "frequent moves to unfamiliar settings, a succession of persons residing in the home, live-in romantic companions for the custodial parent, or other potential disruptions." *Id.* at 465 n 9. Regardless, a court must not consider the "acceptability" of the homes; rather, the court must concentrate on the permanence and stability of the family environments. *Id.* at 464-465. A court simply cannot conclude "that a two-parent home is preferable to a single-parent home simply because it is more 'acceptable.'" *Mogle, supra* at 199-200. Rather, the court must compare the two homes with respect to the permanence and stability they would offer the children. *Id.* at 199-200.

In this case, the court was to consider all up-to-date information, and defendant's remarriage and Anna's presence in the children's lives were relevant updated information. It does not appear the court automatically concluded defendant's two-parent home was more acceptable than plaintiff's single-parent home. Rather, the court noted that Anna was a stabilizing influence on all concerned and has developed a relationship with the children. Therefore, the court was simply acknowledging that Anna brought stability to defendant's family.

Therefore, in comparing the stability and permanence of the two families at the time of the hearing, the boys had grown accustomed to their new schools and appeared to be doing well, defendant and Anna appeared to have a loving relationship, defendant provided a suitable home for his family, defendant had consistent employment, and Anna stayed at home with the children. Plaintiff, on the other hand, lived in a different school district and was in the process of finishing her degree and changing careers. Once she began her new career, it is likely that she would not have been able to stay at home during the day. The children's lives would then be interrupted again. Accordingly, we find that the trial court's findings with regard to factor (e) were not against the great weight of the evidence.

With regard to factor (f), on remand, the court stated that it did not hear any testimony about immoral behavior. However, the court further noted that defendant had demonstrated a greater commitment to religious education, and therefore held that defendant prevailed on this factor.

With regard to church attendance, the record revealed that although neither party attended church during their marriage, both parties began attending church after the divorce. Tallying the number of days each party attended church during the divorce proceeding appears to do little to establish the parties' morals; rather, it appears to be a contest as to who was "more moral." As the Court stated in *Fletcher*, *supra* at 887, "the question under factor f is *not* 'who is the morally superior adult[.]'" Accordingly, we conclude that the court's findings relative to factor (f) were against the great weight of the evidence and should have been considered equal.

With regard to factor (g), on remand, the trial court found that plaintiff had an injured back and noted that there was significant testimony regarding plaintiff's emotional outbursts. The court concluded, "[w]ithout finding whether or not the Plaintiff's disability has any effect on her ability to care for the children the Court finds that the testimony and evidence clearly show that the Defendant is in much better physical and emotional health and prevails on this factor."

First, with regard to plaintiff's physical condition, the trial court held that factor (g) weighed in defendant's favor because he was in much better physical health than plaintiff, regardless of whether plaintiff's physical health had any effect on her ability to care for the children. However, as noted above, all of the statutory factors relate to a person's fitness as a parent. *Fletcher*, *supra* at 886-887. Accordingly, the trial court erred by not reviewing plaintiff's physical health as it related to the children.

With regard to plaintiff's mental health, there was quite a bit of testimony presented as to plaintiff's emotional instability. Dr. Wermuth testified that the parties' fighting was harmful to the children. He discussed this issue in particular with plaintiff because he believed plaintiff was the party "bringing the fight, pressing the battle." Dr. Wermuth further testified that he felt

plaintiff had a lot of anxiety whenever she did not have the children, and that the anxiety was transferring to the children. Additionally, in her report in response to the first complaint filed, Kern noted that the children reported that plaintiff would tell the children that defendant was trying to break her heart and keep the children away from her. There was also an incident that occurred in December 2004, involving domestic violence resulting in plaintiff's arrest.

Therefore, based upon the child protective services agents' reports, Dr. Wermuth's testimony, and the incident involving plaintiff's recent arrest for domestic violence, we conclude that the trial court's findings with regard to plaintiff's emotional instability were not against the great weight of the evidence. Accordingly, we also conclude that the trial court's findings with regard to factor (g) were not against the great weight of the evidence.

With regard to factor (j), on remand, the trial court found that "the parties [did] not have any ability or desire to facilitate or encourage a relationship with the other party. . . . While the Plaintiff may have started it, the Defendant is now finishing and continuing the total lack of cooperation or respect for the other party. The Court finds the parties equal on this factor."

Although the parties can behave civilly toward one another, there are also times when their interactions are less than positive. The children told Kern that plaintiff makes negative comments to them about defendant. Defendant also testified that plaintiff makes negative comments during exchanges. The boys' teachers have also made comment that plaintiff makes tear-filled scenes when dropping the boys off at school. Similarly, there are times when defendant is not very forth coming with plaintiff. For example, plaintiff contends defendant failed to tell her in advance he was changing the children's pediatrician, dentist, or schools; that he was moving into the three-bedroom house; his cell phone number; or the information on the insurance card. The lack of communication has deteriorated to the point that the children's doctors have recommended that the parties use a notebook to communicate about the children's health. Accordingly, we conclude that the trial court's findings relative to factor (j) were not against the great weight of the evidence.

Finally, with regard to factor (l) on remand, the trial court noted that although plaintiff had not prevailed on any factor, there were mitigating factors for plaintiff. The court noted that plaintiff's outbursts were caused by a deep love for her children; that the children needed their mother; that plaintiff had more free time than defendant; and that plaintiff lived next to her parents and could provide an extended family. However, the court also noted that plaintiff's comments and anger were destructive, that plaintiff exhibited emotional turmoil, and there was a total breakdown of communication between the parties.

The court never explicitly stated that factor (l) weighed in favor of plaintiff or defendant. Rather, the court simply reiterated the reasons it had previously discussed relative to other factors as to why the court was awarding joint legal and physical custody of the children. In this case, both parties professed their love for the children. As the trial court noted, plaintiff appeared to be making choices she felt were in her children's best interest. However, as discussed extensively above, plaintiff often made negative comments during exchanges, she had age inappropriate discussions with her children concerning the divorce proceeding, and she had a high level of anxiety the child protective services agent believed transferred to her children. Moreover, since this Court's last holding, plaintiff's emotional outbursts continued to occur, as evidenced by the incident leading to her arrest for domestic assault. Therefore, we conclude that

the trial court's findings relative to factor (l) were not against the great weight of the evidence.

Therefore, although the parties were equal on many of the factors, none of the factors weighed in favor of plaintiff, and some clearly weighed in favor of defendant. Accordingly, we conclude that the court properly awarded joint physical and legal custody of the children, with the children primarily residing with defendant during the school year.

Affirmed.

/s/ Bill Schuette
/s/ Christopher M. Murray
/s/ Pat M. Donofrio